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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Appellant,

v.

RILEY EDWIN BACCUS,

Defendant and Respondent.

B185043

(Los Angeles County  
Super. Ct. No. VA089657)

APPEAL from a judgment of the Superior Court of Los Angeles County, David S. Milton, Judge. Reversed with directions.

Steve Cooley, District Attorney, Lael Rubin, Head Deputy District Attorney, and Tracey Lopez, Deputy District Attorney, for Plaintiff and Appellant.

Michael P. Judge, Public Defender, Albert J. Menaster, Sherri Lira and Graciela Martinez, Deputy Public Defenders, for Defendant and Respondent.

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Riley Baccus entered a plea of no contest to two felony counts and admitted having suffered a prior felony conviction in exchange for an indicated sentence of 4 years in state prison. The People appeal from the ensuing judgment, contending that the sentence was unlawful. We agree and reverse the judgment with directions that defendant be permitted to withdraw his plea.

### **BACKGROUND**

Defendant was charged with making a criminal threat against Cresensiano Revelez and assaulting Revelez on June 17, 2005. It was also alleged that defendant had been convicted of making a criminal threat in 1998 within the meaning of Penal Code section 667, subdivision (a)(1) (section 667(a)(1)), and sections 1170.12/667, subdivisions (b) through (i) (the Three Strikes law).

At a hearing on July 5, 2005, defendant stated that he wanted to accept the court's indicated sentence of 4 years. The People objected, noting that the only way to achieve that sentence would be to impose concurrent lower terms of 2 years doubled under the Three Strikes law and to ignore improperly the 5-year enhancement required under section 667(a)(1). The court stated that, although it was permissible to sentence under both section 667(a)(1) and the Three Strikes law, such a sentence was not appropriate in this case. Following defendant's plea and imposition of a 4-year term, the court stated that it would "decline dual use of [section 667(a)(1) and the Three Strikes law] for the following reasons: [¶] The defendant took responsibility for his criminal misconduct at an early stage of the proceedings; there is no injury to the victims in the matter; defendant's moderate criminal history. [¶] The court has recognized that mental health issues may have contributed to the defendant's behavior. And the court believes 4 years state prison adequately addresses the public wrong."

The People filed a timely notice of appeal from the judgment under Penal Code section 1238, subdivisions (a)(8) and (a)(10), contending that the 4-year sentence was unlawful.

## DISCUSSION

The People argue and defendant in effect acknowledges that the 5-year enhancement of section 667(a)(1) must be imposed; it may not be stayed or stricken. (*People v. Dotson* (1997) 16 Cal.4th 547, 553; *People v. Askey* (1996) 49 Cal.App.4th 381, 389 [“Courts lack discretion to strike or stay allegations of prior serious felony conviction under section 667, subdivision (a)(1)”].) Defendant nevertheless argues that his sentence should be upheld because it constituted a finding by the trial court that imposition of the 5-year enhancement in this case would constitute cruel and unusual punishment. But the appellate record does not support the conclusion that the court made such a determination rather than having merely been mistaken about the requirements of section 667(a)(1). We further note that the question of whether a punishment is cruel and unusual is a matter for independent appellate review (*People v. Felix* (2003) 108 Cal.App.4th 994, 1000), and the instant record is devoid of facts that would provide a basis to enable us to make such an assessment.

The People agree with defendant that in the face of the unlawful sentence that was imposed below, the appropriate remedy is to remand with directions that defendant be permitted to withdraw his plea. We shall so order.

## DISPOSITION

The judgment is reversed and the matter is remanded with directions that defendant be permitted to withdraw his plea of nolo contendere.

NOT TO BE PUBLISHED.

MALLANO, J.

We concur:

SPENCER, P. J.

ROTHSCHILD, J.